United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
1120 20th Street, N.W., Ninth Floor
Washington, DC 20036-3457

SECRETARY OF LABOR	
Complainant,	
v.	OSHRC DOCKET NO. 07-1826
THOMAS LINDSTROM COMPANY,	
Respondent	

Appearances:

Jessica R. Brown, Esquire
U.S. Department of Labor
Philadelphia, Pennsylvania
For the Complainant.

James F. Sassaman
General Building Contractors Assn.
Philadelphia, Pennsylvania
For the Respondent.

Before: Covette Rooney
Administrative Law Judge

DECISION AND ORDER

This proceeding is before the Occupational Safety and Health Review Commission ("the Commission") pursuant to section 10(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 *et seq*. ("the Act"). On May 1, 2007, the Occupational Safety and Health Administration ("OSHA") inspected a work site of Thomas Lindstrom Company ("Lindstrom" or "Respondent"), located in Philadelphia, Pennsylvania. As a result of the inspection, on October 17, 2007, OSHA issued to Respondent a one-item "willful" citation and a one-item "repeat" citation. Respondent contested the citations and proposed penalties, bringing this matter before the Commission. The hearing in this case was held in Philadelphia on July 21 and 22, 2008. At the hearing, the Secretary withdrew the repeat citation, leaving for resolution only the willful citation; the willful citation alleges a violation of 29 C.F.R. 1926.760(a)(1), a provision of OSHA's steel erection standard. Both parties have submitted post-hearing briefs.

The OSHA Inspection

Wylie Hinson is the OSHA compliance officer ("CO") who inspected Respondent's work site. He testified that on May 1, 2007, as he was leaving another work site he had just inspected, he observed the subject site; there were employees working on a roof deck that appeared to be over 30 feet high, and none of the employees was wearing fall protection. The CO telephoned his office and spoke to his supervisor, who told him to inspect the site. The CO then proceeded to photograph the site and the employees on the deck, after which he went on the site and held an opening conference with James Smith, who said he was Respondent's foreman.[1] The CO next spoke with John Beck, who identified himself as Respondent's second foreman. CO Hinson also spoke to Mike Wenzel and Jeff Rush, the two other employees who had been on the deck, and to the general contractor on the site, who told him the roof deck was 44 feet from the ground. (Tr. 36, 42-45, 48, 59-60).

CO Hinson identified GX-4, pages 1 through 11, as photos he took of the site, and he described what they depicted. Page 10 shows a ladder on the ground level as well as the ladder used to access the roof deck. Page 9 shows Mr. Wenzel on the roof deck near the unprotected front edge.[2] Pages 5 and 8 are close-up views of Mr. Wenzel, with bolting locks sticking out of his pockets, and Page 5 shows him welding on the deck about 4 feet from the front edge. Page 2 depicts Mr. Wenzel on the left and Mr. Beck on the right, both about 4 feet from the front edge. Page 1 is another view of Mr. Beck working near the front edge, and Page 4 shows Mr. Wenzel on the left, Mr. Beck in the middle and Mr. Rush on the right; Mr. Rush was about 5 feet from the front edge.[3] Page 3 shows Mr. Beck about 5 feet from the front edge and Mr. Smith 6 to 7 feet from the front edge.[4] The CO said that none of the employees he saw on the deck, including Mr. Smith, had on any fall protection. The

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[1]Although the CO testified that he held his opening conference with Mr. Spangler, it would appear the CO mis-spoke. (Tr. 43). Mr. Spangler is Respondent's safety director, and there is no evidence he was at the site that day. Further, all of the CO's other references to the foremen at the site were to Mr. Smith and Mr. Beck.

[2]The CO stated that the long unprotected edge he was facing as he took his photos, as shown in Pages 2, 4 and 9 of GX-4, was the edge that concerned him. (Tr. 46-47, 54-56, 300).

[3]While the CO indicated Mr. Smith was depicted in Page 4 of GX-4, in the same area where Mr. Rush appears, that is not discernible from the photo. (Tr. 58-63).

[4]The CO said Mr. Smith was "going up and down and back and forth" during the time he was observing the deck and that the closest he saw him to the edge was about 7 feet. (Tr. 63-65).

CO also said the ladder to the deck did not restrict access and that he saw nothing on the deck like control lines or posts to demarcate a controlled decking zone ("CDZ") (Tr. 45-65, 300).

CO Hinson further testified that he took statements from all four employees while he was at the site and that he took additional statements from them at his office during June 2007. In his May 1 statement, Mr. Smith said the welder was working 7 to 8 feet from they edge and the others were 10 to 15 feet from the edge; in his May 2 statement, however, he admitted he knew employees were 4 to 7 feet from the edge and said they were supposed to be at least 6 feet away. In his June 1 statement, Mr. Smith indicated everyone was working at least 6 feet from the edge and that when that was the case fall protection was not required. (GX-6-7). In his May 1 statement, Mr. Beck said the fall protection at the site was a CDZ and keeping 6 feet from the edge; in his June 15 statement, he said everything they were doing was 6 feet "inboard." He indicated Lindstrom's policy was the same as the OSHA standard. (GX-8). In his May 1 statement, Mr. Wenzel said he had been welding in a CDZ and had been 4 to 5 feet from the edge with no fall protection; however, in his June 15 statement, he said he had been about 3 feet from the edge when doing the safety tacking and had gone back to the 6-foot radius for the other welding. When asked about a CDZ, he indicated they had been in the process of getting enough decking down to install a decking zone. (GX-9). In his May 1statement, Mr. Rush said he had been working 10 feet from the edge without fall protection. In his June 15 statement, he admitted he had been 6 feet from the edge; he said this was not Lindstrom's policy but that if you were at least 6 feet away from the edge you were "OK." (GX-9).

During the course of his investigation of the company, CO Hinson learned that since 2002, Lindstrom had been found in violation of the same standard at issue in this case seven times. The CO also learned that in 1994, there had been an employee fatality at a Lindstrom work site.[5] The CO determined that the violation in this case was serious, due to the serious injuries or death that could have resulted from an employee falling from the roof deck, and that it was also willful because of Lindstrom's awareness of the standard. (Tr. 75-79).

Jurisdiction

[5]The Area Director ("AD") of the OSHA office testified that while the cited standard was not in effect then, the 1994 fatality was an employee who fell during steel erection. (Tr. 142-43).

In its answer, Respondent admits that, at all relevant times, it was engaged in a business affecting commerce and was an employer within the meaning of sections 3(3) and 3(5) of the Act. It also admits that jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act. *See* Answer, ¶¶ I through V. I find, therefore, that the Commission has jurisdiction of the parties and the subject matter in this case.

The Cited Standard and the Secretary's Burden of Proof

The cited standard, 29 C.F.R. 1926.760(a)(1), provides as follows:

> Except as provided by paragraph (a)(3) of this section [*i.e.*, except for connectors and employees working in controlled decking zones], each employee engaged in a steel erection activity who is on a walking/working surface with an unprotected side or edge more than 15 feet (4.6 m) above a lower level shall be protected from fall hazards by guardrail systems, safety net systems, personal fall arrest systems, positioning device systems or fall restraint systems.

To prove a violation of an OSHA standard, the Secretary must demonstrate by a preponderance of the evidence that (1) the standard applies, (2) the terms of the standard were not met, (3) employees had access to the violative condition, and (4) the employer knew, or could have known with the exercise of reasonable diligence, of the violative condition. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The Secretary contends that she has met her burden of proof because Lindstrom's employees, including the foremen, were working near the edge of the 44-foot-high roof deck without any fall protection. Lindstrom, on the other hand, contends that it did not violate the standard because a CDZ was in effect on the roof deck.

The Applicability of the Cited Standard

At the hearing, Respondent's representative indicated his disagreement that the employees at the site were engaged in steel erection. (Tr. 19). However, the standard defines "steel erection" as "the construction, alteration or repair of steel buildings, bridges and other structures, including the installation of metal decking and all planking used during the process of erection." *See* 29 C.F.R 1926.751. Furthermore, when the CO asked the employees at the site what they had been doing on the roof level, they told him they were laying and welding decking.[6] (GX-6-9). Finally, Respondent

[6]As the Secretary points out, the statements the employees made to the CO are admissible as admissions of employees concerning matters within the scope of their employment, pursuant to Rule 801(d)(2)(D) of the Federal Rules of Evidence. *See Regina Constr. Co.*, 15 BNA OSHC

has admitted in its answer, and the parties have stipulated, that the cited standard applies to the condition set out in the citation. *See* Answer, ¶ X. *See also* GX-44, p. 3. Accordingly, I find that the Secretary has established the applicability of the cited standard.

Whether the Terms of the Standard were Met

CO Hinson's testimony set out above was that employees were working 4 to 7 feet from the edge of the unprotected roof deck, which was 44 feet from the ground, without any fall protection.[7] The CO's testimony is supported by the photos he took and by the statements employees made to him during his investigation; in particular, the employees admitted in their statements that work had been taking place 3 to 7 feet from the edge of the roof deck and that no fall protection had been in use. (GX-6-9). I observed the CO's demeanor on the witness stand and found him to be a credible and convincing witness. In view of this finding, and based on the supporting photos and employee statements, the CO's testimony is credited. I thus find that on May 1, 2007, Lindstrom's employees were working 3 to 7 feet from the edge of the 44-foot-high roof deck without fall protection.

In light of the foregoing and the terms of the cited standard, Lindstrom was in violation of the standard unless it can establish, as it contends, that a CDZ was in effect on the roof deck. The requirements for a CDZ are set out at 29 C.F.R. 1926.760(c), as follows:

> (c) *Controlled Decking Zone (CDZ).* A controlled decking zone may be established in that area of the structure over 15 and up to 30 feet above a lower level where metal decking is initially being installed and forms the leading edge of a work area. In each CDZ, the following shall apply:
>
> (1) Each employee working at the leading edge in a CDZ shall be protected from fall hazards of more than two stories or 30 feet (9.1 m), whichever is less.
>
> (2) Access to a CDZ shall be limited to only those employees engaged in leading edge work.
>
> (3) The boundaries of a CDZ shall be designated and clearly marked. The CDZ shall not be more than 90 feet (27.4 m) wide and 90 (27.4 m) feet deep from any leading edge. The CDZ shall be marked by the use of control lines or the equivalent.

1044, 1047-48 (No. 87-1309, 1991).

[7]The CO testified the general contractor at the site told him the roof deck was 44 feet high. (Tr.45). Mr. Smith also said the distance was 44 feet, at the hearing and in his statement to the CO. (Tr. 223; GX-7, p.2). Further, Respondent has admitted employees were working 43 feet 10 inches from the ground. (GX-21, p. 9; GX-22, pp. 1, 2, 8).

> Examples of acceptable procedures for demarcating CDZ's can be found in Appendix D to this subpart.
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> (4) Each employee working in a CDZ shall have completed CDZ training in accordance with § 1926.761.
>
> (5) Unsecured decking in a CDZ shall not exceed 3,000 square feet (914.4 m^2).
>
> (6) Safety deck attachments shall be performed in the CDZ from the leading edge back to the control line and shall have at least two attachments for each metal decking panel.
>
> (7) Final deck attachments and installation of shear connectors shall not be performed in the CDZ.

James Spangler, Respondent's safety director, testified about the requirements of a CDZ. Specifically, he testified that a CDZ is an area where the initial installation of metal decking is taking place, between 15 to 30 feet above the lower level, where the use of fall protection is not required. He further testified that a CDZ is "misconstrued as to what it is," indicating his belief that demarcating a CDZ is not actually required and that a CDZ is established as soon as decking is in place and access to the area is controlled. Mr. Spangler said Lindstrom controlled its CDZ's by using ladders or lifts to access the CDZ, since construction workers "normally just by-pass" signs or notices, and that no other trade could get onto the decking level without being tied off. He also said that once 8100 square feet of decking was down, Lindstrom would put control lines up around the four sides in order to perform the final attachments of the metal decking. (Tr. 184-87).

In considering the above, I note that some of Mr. Spangler's statements directly contradict the CDZ requirements set out *supra*. For example, his testimony indicating that demarcating a CDZ is not really required conflicts with section 1926.760(c)(3), which states that "[t]he boundaries of a CDZ shall be designated and clearly marked" and that "[t]he CDZ shall be marked by the use of control lines or the equivalent."[8] Further, his testimony indicating that other trades could be on the decking level if they were tied off conflicts with section 1926.760(c)(2), which states that "[a]ccess

[8]Appendix D, ¶ (1)(i), states that a control line for a CDZ "is erected not less than 6 feet ... from the leading edge," and ¶ (1)(iii) states that "[c]ontrol lines consist of ropes, wires, tapes, or equivalent materials, and supporting stanchions...." Upon being examined by the Secretary's counsel, Mr. Spangler admitted that the boundaries of a CDZ had to be clearly marked and that control lines were required. (Tr. 159). The CO and the AD testified about the requirements for CDZ's, including control lines, and both stated that while no fall protection was required when inside a CDZ, it was required when outside a CDZ. (Tr. 38-41, 109-10, 114-15, 153-55).

to a CDZ shall be limited to only those employees engaged in leading edge work." Most important, however, was Mr. Spangler's noting the 15 to 30-foot limit above a lower level at which a CDZ could be used and his statement that, if an employee was working at an unprotected edge such that he could fall over 30 feet, fall protection would be required. (Tr. 158, 202). The record clearly shows that the long unprotected front edge of the roof deck was the area the CO was concerned about and that the fall distance from that edge was 44 feet.[9] Therefore, pursuant to sections 1926.760(a)(1) and (c) and Mr. Spangler's own testimony, fall protection was required for the employees at the job site.

Based on the record, I find that there was no CDZ on the roof deck within the meaning of the standard because access was not limited and there were no "control lines or the equivalent" to demarcate the CDZ, as required; in this regard, I note the CO's testimony that the ladder did not restrict access, like a ladder along with a sign would have, and that he saw nothing such as control lines or posts on the deck to demarcate a CDZ. (Tr. 48-49, 54, 57-61, 300-01). Although Messrs. Smith and Beck, the two foremen who had been at the work site, both testified that there was a CDZ on the roof deck, their testimony was plainly contrary to the requirements for a CDZ; they both indicated that a CDZ is established by the mere fact that decking is being installed and access to the area is controlled. (Tr. 207, 226-27, 234, 257-59). I conclude that Lindstrom has not shown that a CDZ was in effect on the roof deck. Accordingly, the Secretary has met her burden of demonstrating that the terms of the standard were not met.[10]

Whether Employees had Access to the Violative Condition

[9]Respondent's contention that the fall distance was 11 feet, to the deck below, is rejected; while some areas of the roof deck may have exposed employees to falls of 11 feet, G-4, the CO's photos, show there was nothing on the front edge of the roof deck to prevent falls of 44 feet.

[10]Although not addressed in its brief, Respondent suggested a further argument at the hearing; that is, Messrs. Smith and Beck both testified that when working 6 feet from the edge, no fall protection was required. (Tr. 207-08, 238-39). However, Mr. Spangler himself testified that fall protection was required when working 6 feet from the edge. (Tr. 198, 201). Further, the AD testified that OSHA cites employers who attempt to substitute a distance from the edge rather than using fall protection under the standard. (Tr. 115-17). In any event, the employee statements to the CO, as noted at the beginning of this decision, show that work was taking place 3 to 7 feet from the edge of the roof deck without any fall protection.

As the Secretary points out, this element can be established either by facts showing actual employee exposure or by facts showing employee access to the hazard. *See, e.g., Fabricated Metal Prod., Inc.*, 18 BNA OSHC 1072, 1073-74 (No. 93-1853, 1997). The testimony of CO Hinson, set out at the beginning of this decision, clearly demonstrates that employees were exposed to the violative condition, that is, the hazard of falling 44 feet from the edge of the unprotected roof deck. Specifically, the CO observed and photographed the cited condition; in addition, the employees verified in their statements to him that work was taking place 3 to 7 feet from the roof deck edge and that no fall protection was in use. (Tr. 45-65, GX-4). *See also* GX-6-9. The Secretary has met her burden of showing employee exposure to the violative condition.

Whether the Employer had Knowledge of the Violative Condition

The Secretary may prove the knowledge element by showing that the employer either had actual knowledge of the cited condition or could have known of it with the exercise of reasonable diligence. *Astra Pharmaceutical Prod.*, 9 BNA OSHC 2126, 2129 (No. 78-6247, 1981). The actual or constructive knowledge of an employer's foreman or supervisor of the cited condition can be imputed to the employer. *See, e.g., A.P. O'Horo Co.*, 14 BNA OSHC 2004, 2007 (No. 85-369, 1991). In this case, the CO saw all four of the employees near the edge of the deck without any fall protection; in particular, the CO saw Messrs. Beck and Smith working about 5 and 6 to 7 feet, respectively, from the edge, and Messrs. Wenzel and Rush working about 4 and 5 feet, respectively, from the edge. (Tr. 45-65; GX-4). The record shows that Messrs. Smith and Beck were the two foremen at the site.[11] (Tr. 207, 234, 257-58). In his May 2, 2007, statement, Mr. Smith admitted he knew employees had been working 4 to 7 feet from the edge without fall protection. (GX-7, p. 2). In his June 15, 2007, statement, Mr. Beck admitted employees were working 6 feet from the edge without fall protection. (GX-8, p. 2). Based on the record, Messrs. Smith and Beck had actual knowledge of the cited condition, especially since they themselves were participating in the violative conduct. (Tr. 208, 238-40; GX-6, p. 1; GX-8, pp. 1-2). Their knowledge is imputable to Lindstrom,

[11]Mr. Beck indicated at the hearing that he was not actually serving as a foreman at the site. (Tr. 257-58). That testimony is contrary to what he told the CO on May 1, 2007. (Tr. 43). It is also contrary to Lindstrom's admission that both Mr. Smith and Mr. Beck were foremen at the site. (GX-22, pp. 2, 8). I find that Messrs. Smith and Beck were both foremen at the job site.

and the Secretary has shown Respondent had actual knowledge of the cited condition. The Secretary has proved all four of the required elements noted above. This citation item is therefore affirmed.

Whether the Violation was Serious

A violation is serious if there was a substantial probability that the condition could have resulted in death or serious physical harm. *See* section 17(k) of the Act. CO Hinson testified, and I find it apparent, that a fall of 44 feet from the edge of the roof deck would have resulted in serious injuries or death. (Tr. 77). The violation is accordingly affirmed as serious.

Whether the Violation was Willful

As the Secretary notes, a willful violation is "an act done voluntarily with either an intentional disregard of, or plain indifference to, the [OSH] Act's requirements." *Bianchi Trison Corp. v. Chao*, 409 F.3d 196, 208 (3rd Cir. 2005) (citations omitted). Further, the Commission has held that "[a] willful violation is differentiated by heightened awareness of the illegality of the conduct or conditions and by a state of mind of conscious disregard or plain indifference...."*Hern Iron Works, Inc.*, 16 BNA OSHC 1206, 1214 (No. 89-433, 1993) (citations omitted). The Secretary contends that the willful nature of the violation in this case is established by Lindstrom's history of violations of the same standard, the employee fatality at a Lindstrom work site in 1994, and the safety manual and training Lindstrom provided to employees.

The AD testified that Lindstrom was cited seven times between 2002 and 2006 for violating section 1926.760(a)(1). (Tr. 118-42). The Secretary presented documentary proof of the citations relating to those violations as well as proof that the citations were final orders. *See* GX-23-43. Respondent has stipulated to each of the violations and final orders. *See* GX-44. *See also* R. Brief, p. 3. The Secretary's exhibits and the AD's testimony clearly establish the similarities between the previous citations and the one at issue.

The AD further testified that there was an employee fatality at one of Respondent's work sites in 1994. He noted that while the standard cited there was not the same as the one cited in this case, the current steel erection standard was not in effect then. He also noted that the Lindstrom employee who died in 1994 fell while performing steel erection activity. (Tr. 118, 142-43).

Finally, the AD testified that Messrs. Smith and Beck had been at sites that were previously inspected and citations were issued. During an inspection in December 2003, which resulted in a

citation for a violation of section 1926.760(a)(1), Mr. Beck was a foreman at the site and Mr. Smith was an ironworker; according to the abatement letter Lindstrom provided OSHA, all the workers at the job site, including Messrs. Beck and Smith, were retrained in the proper use of fall protection. (Tr. 129-31; GX-18, 26, 28). During an inspection in August 2004, which also resulted in a citation for a violation of section 1926.760(a)(1), Mr. Smith was the foreman at the site; according to the abatement letter Lindstrom provided to OSHA, the employees were retrained in fall exposure awareness and in using fall protection properly.[12] (Tr. 137-40; GX-20, 38, 40).

Respondent offered nothing to refute the Secretary's evidence as to the seven prior violations, the 1994 fatality, or the fact that Mr. Smith and Mr. Beck had been foremen at previous sites where citations for violations of section 1926.760(a)(1) were issued. I find, therefore, that Lindstrom was in violation of the cited standard seven times between 2002 and 2006 and that a Lindstrom employee died at one of Respondent's work sites in 1994 after falling during steel erection activity. I further find that Messrs. Smith and Beck were foremen at previous Lindstrom work sites when citations were issued for violations of section 1926.760(a)(1).

In addition to the above, the record shows that Mr. Spangler has been Lindstrom's safety director, with responsibility for the company's overall safety, since the mid-seventies. (Tr. 157-58). The record also shows that Mr. Spangler was familiar with all of Lindstrom's OSHA inspections, that it was his job to ensure abatement occurred, and that he provided training and abatement letters after the inspections taking place in December 2003, January 2004 and August 2004. (Tr. 173-79; GX-18-20). Mr. Spangler testified that Lindstrom had a "heightened awareness" as to fall protection. He noted that Lindstrom's safety manual contains a reprint of the requirements of OSHA's steel erection standard. He also noted that the company takes every violation seriously and addresses it by correcting the problem and providing further training to the employees; he said that employees, including foremen, were not disciplined as he did not believe that was effective. Mr. Spangler stated that he conducts about ten site visits per week; he gives general fall protection training intermittently

[12]Mr. Smith agreed he had been at the sites in December 2003 and August 2004 when inspections occurred, citations were issued, and he was retrained. (Tr. 221-22).

and CDZ training several times a week at job sites.[13] He also stated that he would continue his training, because he knew that he had to to ensure compliance, and it was his belief that compliance among Lindstrom's job sites was showing an upward trend. (Tr. 159-60, 171, 195-96, 289-91).

In view of the foregoing, I agree with the Secretary that Lindstrom had heightened awareness of the requirements of the cited standard. As she points out, the Commission has consistently held that prior violations of the same standard by an employer establish a heightened awareness of the standard. *Capeway Roofing Sys.*, 20 BNA OSHC 1331, 1341 (No. 00-1986, 2003); *Revoli Const. Co.*, 19 BNA OSHC 1682, 1685 (No. 00-315, 2001). As she also points out, an employee accident combined with a failure to correct the dangerous condition which led to the accident is sufficient to demonstrate heightened awareness. *McKie Ford, Inc.*, 191 F.3d 853, 857 (8th Cir. 1999). In addition, the Secretary points out that the inclusion of the standard in Lindstrom's safety manual, and the fact that the foremen at the subject site had been at previous sites where violations of the same standard were found, show Lindstrom's heightened awareness of the standard's requirements. *Lanzo Constr. Co.*, 20 BNA OSHC 1641, 1648-49 (No. 97-1821, 2004), *aff'd*, 150 Fed.Appx. 983, 2005 WL 2649122, 21 BNA OSHC 1432 (C.A. 11, No. 04-11965, 2005).

I also agree with the Secretary that Respondent's actions in this case exhibit an intentional disregard of the standard's requirements. Despite their knowledge of the standard, Messrs. Smith and Beck allowed employees to work near the unprotected edge of the roof deck without fall protection; moreover, the two foremen participated in the violative conduct in that they worked alongside the other employees without using any fall protection. The Commission has held that a foreman who knowingly allows employees to work without the necessary protective equipment has acted with intentional disregard. *Rawson Contractors, Inc.*, 20 BNA OSHC 1078, 1081-82 (No. 99-18, 2003); *V.I.P. Structures, Inc.*, 16 BNA OSHC 1873, 1875 (No. 91-1167, 1994). The Commission has further held that an employer is "responsible for the willful nature of its supervisor's actions to the

[13]Mr. Spangler testified as to the CDZ and section 1926.760 training he had provided to Messrs. Smith and Beck; Messrs. Smith and Beck indicated that they had received such training, including the toolbox talk forms Mr. Spangler devised and required employees to read, sign and return to him. (Tr. 160-70, 211-18, 228-29, 240-43; GX-14-16).

same extent that the employer is responsible for their knowledge of violative conditions." *Tampa Shipyards, Inc.*, 15 BNA OSHC 1533, 1539 (Nos. 86-360 & 86-469, 1992) (citations omitted).

Finally, I agree with the Secretary that Respondent's failure to effectively enforce its fall protection requirements, and in particular its failure to discipline employees when violations were detected, demonstrates Lindstrom's intentional disregard of the standard's requirements. I have noted Mr. Spangler's testimony about the training he provided, including the toolbox talk forms employees were required to read and sign. *See* footnote 13. However, the Commission has held that "effective implementation of a safety program requires a diligent effort to discover and discourage violations of safety rules." *Hackensack Steel Corp.*, 20 BNA OSHC 1387, 1393 (No. 97-755, 2003) (citations omitted). Mr. Spangler admitted that Lindstrom had never disciplined any employees, including foremen, for violations of its fall protection requirements. (Tr. 171). I thus conclude that Lindstrom's failure to enforce its fall protection requirements exhibits intentional disregard.

Based upon the evidence of record, I find that Respondent was in willful violation of the cited standard. The violation of 29 C.F.R. 1926.760(a)(1) is accordingly affirmed as willful.

Penalty Determination

The Secretary has proposed a penalty of $49,000.00 for the willful citation item in this case. The Commission is the final arbiter of penalties, and, in determining an appropriate penalty, the Commission is required to give due consideration to the gravity of the violation and to the employer's size, history and good faith. *J.A. Jones Constr. Co.*, 15 BNA OSHC 2201, 2213-14 (No. 87-2059, 1993). The gravity of the violation is generally the most important factor. *Trinity Indus., Inc.*, 15 BNA OSHC 1481, 1483 (No. 88-2691, 1992). CO Hinson testified that he considered the gravity of the violation high, due to the fall distance involved and the fact that employees were working 3 to 4 feet from the edge of the roof deck. In addition, he indicated that while Lindstrom was given a reduction in penalty for the company's size, no reduction for history or good faith was given due to the history of prior violations and the willful classification of the violation. (Tr. 75-79). In view of the testimony of the CO, and the circumstances of this case, I find the proposed penalty appropriate. The proposed penalty of $49,000.00 is assessed.

ORDER

Based upon the foregoing findings of fact and conclusions of law, it is ORDERED that:

1. Item 1 of Willful Citation 1, alleging a violation of 29 C.F.R. 1926.760(a)(1), is AFFIRMED as willful, and a penalty of $49,000.00 is assessed.

2. Item 1 of Repeat Citation 2, alleging a violation of 29 C.F.R. 1926.761(b), is VACATED.

/s/_____

Covette Rooney
Judge, OSHRC

Date: 12 December 2008
Washington, D.C.